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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-96

DANIEL E. DAMON, Superintendent of Elmira Reformatory,
Petitioner,

against

SHELDON LEESON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. _____

DANIEL E. DAMON, Superintendent of Elmira Reformatory,

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against

SHELDON LEESON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in *United States ex rel. Sheldon Leeson* v. *Damon,* entered on April 1, 1974 and as amended upon rehearing on May 13, 1974 (Hays, J., dissenting).

Opinion Below

The District Court's opinion is unreported. It is reproduced as Appendix "A". The opinion of the Court of Appeals for the Second Circuit is reported at 496 F. 2d 718. It is reproduced as Appendix "B".

Jurisdiction

The judgment of the Court of Appeals was entered on April 1, 1974 and amended on May 13, 1974.

The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether respondent's allegation that defense counsel misadvised him as to the sentence he could receive upon his plea to attempted grant larceny in the second degree can invalidate his plea which was freely and voluntarily entered by respondent after consultation with retained counsel whose representation was in all respects adequate and where the state court found that the prosecution would be prejudiced by any withdrawal of the guilty plea?

2. Whether the District Court rather than the New York courts should determine the relief to be accorded respondent upon his allegation that his attorney misadvised him as to the maximum sentence he could receive.

Statement of the Case

In an indictment filed February 3, 1967, the respondent and one Samuel Carville were charged with three counts of forgery in the third degree and three counts of grand larceny in the first degree, in that, on June 24, September 27 and September 30, 1966, they made false entries in a record of accounts and a book of accounts of Hayden, Stone, Inc., and thereby appropriated a total of $12,400 (Indictment No. 496-67).

On September 19, 1967, respondent, represented by retained counsel, Selig Lenefsky, Esq., appeared before Mr. Justice Schweitzer, and offered to plead guilty to the

charge of attempted grand larceny in the second degree to cover all charges in the indictment (Minutes of September 19, 1967, p. 2). The following colloquy took place:

> "The Court: By your pleas of guilty do you admit that in New York County, between June 24, 1966, to on or about October 30, 1966, you with intent to deprive or degrade (sic) another stole certain property owned by Haid & Stone (sic), Inc., having an adequate (sic, should be 'aggregate') value in excess of $5,000, that is certain checks, and did you effect such theft by making a false and fraudulent representation as set forth in the fourth count in the indictment to one of the employees of Haid & Stone, Inc., to wit, that there was an equity in the account of one Samuel Carvel (sic), equal to and in excess of the amount of the checks which you stole. Did you commit those acts?
>
> The Defendant: Yes. I did.
>
> The Court: Now, 'did you at the time that you made these representations and presences (sic), know that they were false, and did you make them for the purpose of having Haid & Stone rely upon those representations?
>
> The Defendant: Yes, sir.
>
> The Court: And did you at that time know that there was not an equity in the account of Samuel Carvel equal or in excess of the amount of the checks? You knew that there was no such equity, is that right?
>
> The Defendant: Yes.
>
> The Court: Now, has anyone given you any promise as to what sentence I would impose upon you in order to induce you to enter this plea of guilty?
>
> The Defendant: No, sir." (Id., pp. 2-3)

The plea was accepted, and, at the request of counsel, sentence was postponed so that the court, at sentence, could consider a forthcoming Nassau County indictment against the defendant (Id., pp. 4-5).

After the respondent entered his guilty plea, the People in reliance thereon recommended that the case against the co-defendant be dismissed. In the dismissal recommendation, the People revealed that the loss to Hayden, Stone, Inc. was discovered by an audit taken on September 30, 1966, and that the respondent had made a confession to the officers of Hayden, Stone, Inc., the recommendation setting forth the substance of that confession, and the other evidence against Leeson.

Two months later, in a letter to Mr. Justice Schweitzer, dated November 30, 1967, the respondent requested that he be permitted to withdraw his guilty plea. He stated that the reason for his request was that "Mr. Lenefsky [who 'forgot how young I am'] promised me that my maximum sentence would be 1.3-2.6 years. This would be inclusive of all my other cases." He complained that the court "insist[s] on sentencing me to Elmira Reformatory." However, he then claimed:

> "Right now I do not even want the 1.3-2.6 sentence. I only copped out because I felt that my other cases were hopeless. I find that they are far from hopeless, and in all likelihood I will beat them. • • • I only took the plea because Mr. Lenefsky promised that all my cases would be thrown into the Att. Grand 2 sentence."

On January 22, 1968, the respondent, represented by Mr. Lenefsky, appeared before Justice Schweitzer for a hearing on his motion (Minutes of January 22, 1968). Respondent testified that he was 23 years old, and that prior to the entry of his plea, he spoke to Mr. Lenefsky and asked what sentence he was facing, that Mr. Lenefsky said he was facing one year and three months to two years and six months (Id., pp. 2-3). He testified that he assumed that Mr. Lenefsky had an assurance from the court, but he did not ask if he had such an assurance (Id., pp. 8-9). He stated that, after he had entered the plea, Mr. Lenefsky

told him that he had overlooked the fact that petitioner was still eligible to be sentenced to Elmira Reformatory since he was still under 30 (Id., p. 3).

Leeson said that he was not guilty of the crime he pleaded guilty to, and that he had pleaded only for the sake of expedience (Id., pp. 9-10).

Justice Schweitzer rejected respondent's explanation for his guilty plea. *Inter alia,* he noted that respondent claimed that "he copped out because I felt that my other cases were hopeless" and that he disclaimed that he was guilty of the charges in the indictment. On the contrary, Justice Schweitzer found that the respondent had specifically acknowledged the commission of the criminal acts and that his claim of innocence was additionally belied by incriminatory admissions in his pre-sentence report. The state court judge held that substantial prejudice would inure to the People's case if withdrawal of the guilty plea were permitted, since it had altered its position by filing a recommendation for dismissal of the indictment against the co-defendant.

On February 5, 1968, respondent was sentenced to the Elmira Reformatory for a term not to exceed five years.* Respondent completed service of this sentence on September 2, 1972 and is no longer under any form of restraint.

Respondent appealed his conviction to the Appellate Division, First Department claiming that (1) he was misadvised by counsel as to the sentence he would receive and should have been permitted to withdraw his guilty plea and (2) that it was error for the court to permit Selig Lenefsky, his prior counsel, to represent him at the hearing on his motion to withdraw his plea.

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* According to the records of the New York State Board of Parole respondent was paroled on August 26, 1969, approximately one year and seven months after sentencing.

The Appellate Division affirmed on October 14, 1969, 33 App. Div. 2d 656. Leave to appeal to the New York Court of Appeals was granted. The judgment was unanimously affirmed, 27 N Y 2d 680 (1970). ["The People argued that the denial of the motion did not constitute an abuse of discretion since, even if the erroneous sentence prediction allegedly made by defendant's counsel had induced the guilty plea, it did not entitle the defendant to withdraw the plea, on reliance upon which the People had altered its position and exposed its evidence."]

By petition dated August 21, 1972, respondent instituted an application for a federal writ of habeas corpus claiming that his plea was unconstitutional since his attorney had allegedly misadvised him as to the sentence he might receive upon his plea of guilty to attempted grand larceny in the second degree.

The District Court held that respondent did not present the constitutional issue that his plea was unknowingly and involuntarily entered to the state court and denied respondent's application for failure to exhaust available state remedies.

The Second Circuit (Hays, J., dissenting) reversed the order of the District Court holding that respondent's plea was invalid since it was entered in ignorance of its direct consequences. Upon reargument, the Circuit Court left to the District Court, the task of determining whether the plea should be vacated or whether respondent should be given the sentence he alleged he believed to be the maximum. Judge Hays, in his dissent, held that respondent's counsel was not so ineffective as to raise a constitutional issue.

Reasons for Granting the Writ

I.

The Circuit Court applied an incorrect standard in assessing the validity of respondent's plea.

This case illustrates a continuing effort in the Second Circuit to downgrade the effect of the guilty plea, such as was entered at bar. See, *Lefkowitz* v. *Newsome, cert. granted* June 17, 1974. No. 73-1627.

Here there is absent any claim that the prosecution [or the court] had made any representation as to sentence as in *Santobello* v. *New York*, 404 U.S. 257, 92 S.Ct. 495 (1971), but simply a *claim* by the defendant that his attorney had been mistaken as to the prospective sentence and that he had entered the guilty plea based upon the attorney's advice.

We submit that if plea bargaining, the importance of which this court recognized in *Santobello*, is to have any continued viability, the free and easy attitude toward the state court guilty plea resulting from the plea bargaining must be cut off by this Court.*

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* In *Mosher* v. *La Vallee*, 491 F. 2d 1346 (2d Cir. 1974), cert. den. —— U.S. —— (1974), the defendant claimed his attorney told him that the state judge had promised the specific sentence. The Second Circuit said the case was "unique" and raised the question of effective assistance of counsel. Despite the belief that the situation was "unique", this was promptly followed by *U.S. ex rel. Oliver* v. *Vincent*, —— F. 2d —— (2d Cir., June 3, 1974, No. 73-2246), involving a claim of "his attorney's false assurances that an agreement had been reached for the imposition of a more favorable sentence" in which the Second Circuit said the *Mosher* case rendered "any discussion of the governing principles and other cases superfluous." It is obvious that, as indicated above, there is being spawned a flow of cases challenging the guilty plea based on a defendant's asserted assurances from his attorney, which are claimed to have turned out as mistaken.

Here, respondent's claim that his plea was entered on a misunderstanding as to the maximum possible sentence he could receive relates only to the alleged failure of his trial attorney to inform him that he could alternatively be sentenced to a five year reformatory term because of his age. It is undisputed that neither the prosecutor nor the trial court made any sentence representations which were not met. In this posture, the validity of respondent's plea should be assessed in terms of the competency of his trial counsel and whether the representation accorded respondent was such as to shock the conscience of the Court and render the proceedings a farce or mockery of justice and not pursuant to the voluntarily and knowingly entered standard set forth in *Kercheval* v. *United States*, 274 U.S. 220 (1927) and relied upon by the Circuit Court.

Although this Court has never ruled on the precise standard to be applied in assessing the validity of a plea entered after alleged misadvice by a defendant's own trial counsel as to the maximum punishment he faced upon his conviction, the approach of the Second Circuit in the case at bar conflicts with the reasoning of this Court in *McMann* v. *Richardson*, 397 U.S. 759, 775 (1970), where this Court stated:

> "It is no denegation of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further he assumes that risk of ordinary error in either his or *his attorney's assessment of the law* and facts . . . he is bound by his plea unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all a knowing and intelligent act." (Emphasis supplied)

The Second Circuit, in applying *Kercheval*, has established a blanket rule which ignores the fact that a defendant frequently pleads guilty for many reasons other than sentence

and that a defendant's interaction with his attorney is an ongoing relationship in which all aspects of a case are discussed. During such discussions, an attorney obviously would emphasize those aspects of a case about which his client is most concerned and under such circumstances, a failure to advise as to an alternative sentencing provision must be assessed in the light of the overall effectiveness of the representation otherwise accorded a defendant. Presumptively, defense attorney's interest in a case is coextensive with his client's interest and there is thus no reason to apply the more stringent standard of *Kercheval* to the set of facts at bar.

We believe certiorari should also be granted in the instant case since the Third, Fifth, Seventh and District of Columbia Circuits have analyzed claims similar to that raised by respondent in terms of the overall competency of the defense and thus are in conflict with the Second Circuit decision herein. *Smith* v. *United States*, 324 F. 2d 436 (D.C. Cir. 1963); *Georges* v. *United States*, 262 F. 2d 426 (5th Cir. 1959); *United States* v. *Shneer*, 194 F. 2d 598 (3d Cir. 1952); *United States* v. *Searle*, 180 F. 2d 209 (7th Cir. 1950).

Moreover, even within the Second Circuit, the decisions are conflicting. Thus, in *United States* v. *Horton*, 334 F. 2d 153 (2d Cir. 1964), the defendant sought to invalidate his plea on the ground that defense counsel had represented that the Assistant United States Attorney would recommend a sentence shorter than the possible maximum, although the established rule in the Second Circuit is that the federal prosecutor may not make a sentence recommendation. The Second Circuit held that, notwithstanding this erroneous sentence advice by defense counsel, this was insufficient to entitle the petitioner to withdraw his plea.

> "It has recently and we think correctly said that erroneous advice by defense counsel as to sentence does

not support attack under § 2255 unless it amounts to ineffective assistance of counsel of such kind as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice." *United States* v. *Horton, supra,* 153.

In *United States ex rel. Scott* v. *Mancusi,* 429 F. 2d 451 (2d Cir. 1971), the petitioner sought to invalidate his plea on the grounds that defense counsel erroneously informed him prior to his plea that it could be withdrawn at any time. Defense counsel erred since the plea was subject to withdrawal only upon approval of the trial court. The Second Circuit stated:

> "Although it is surprising that counsel would not be aware of the governing New York Statute, his conduct was not such as would 'shock the conscience of the Court and make the proceedings a farce and mockery of justice' . . . See also, *United States ex rel. Maselli* v. *Reincke,* 383 F. 2d 129, 132 (2d Cir. 1967) where it is stated that for there to be a lack of compliance with the fundamental fairness essential to due process counsel's representation must be so 'horribly inept as to amount to a breach of his legal duty faithfully to represent his client's interest . . .' The present case is a long way from meeting the tests set out above."

Additionally, the Circuit Court improperly and unfairly ignored the fact that the People would be substantially prejudiced, as the state court found, because the People had already filed a recommendation for dismissal of charges against respondent's codefendant in which its entire case had been revealed. *U.S.* v. *Del Valle Rojas,* 463 F. 2d 228 (9th Cir. 1972), *U.S.* v. *Harvey,* 463 F. 2d 1022 (4th Cir. 1972), *cert. den.* 411 U. S. 972.

This fact weighed heavily in the trial court's determination, upheld by the state appellate courts, to deny respondent's request to withdraw his plea.*

The Circuit Court invaded the function of the state courts on question of discretion which is a matter of state law, not normally reviewable by federal habeas corpus *Lisenba* v. *California*, 316 U.S. 19, 228 (1941).

Respondent at bar took the best choice open to him—to plead to attempted grand larceny in the second degree. The People had a strong case, the defendant having admitted his guilt. He has never alleged that he had any defenses to the charges and respondent's allegation that his attorney overlooked an alternative sentencing provision is not sufficient to invalidate his plea.

Since collateral relief is available to state prisoners many years after conviction, especially where a defendant is attacking a predicate conviction which is serving as a basis for multiple offender treatment, we believe that the issue raised herein merits the plenary consideration of this Court.

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* In *Santobello*, Justice Marshall said (404 U.S. 268-269): "It is worth nothing that in the ordinary case where a motion to vacate is made prior to sentencing, the Government has taken no action in reliance on the previously entered guilty plea and would suffer no harm from the plea's withdrawal. More pointedly, here the State claims no such harm beyond disappointed expectations about the plea itself. At least where the government itself has broken the plea bargain, this disappointment cannot bar petitioner from withdrawing his guilty plea and reclaiming his right to a trial."

II.

The decision of the Circuit Court which permits the District Court to determine whether respondent's plea should be vacated or whether he should be given the maximum sentence he alleges he believed he could receive was improper.

While the important consideration on this application is the challenge to the plea of guilty on subjective testimony as here, there is a further collateral improper assumption of authority by the Circuit Court. That court, after reargument, remanded this case to the District Court to fashion relief appropriate under the facts and circumstances, leaving it to the District Court to determined whether to invalidate the plea or impose a maximum sentence of 2.6 years on respondent. However, respondent was a state prisoner attacking a state conviction,* and such a remand to the District Court conflicts with *Santobello,* 404 U.S. at 263, where this Court remanded to the state courts for further consideration, leaving the ultimate relief to be accorded to respondent in that case to the discretion of the state court.

Since upon a state conviction, the extent of punishment is for the State tribunal, it was a violation of principles of comity to remand to the District Court for the fashioning of relief.

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* Respondent instituted his federal habeas corpus application on August 21, 1972, approximately two weeks before his five year term concluded on September 2, 1972.

CONCLUSION

For the foregoing reasons, the instant petition for a writ of certiorari should be granted and the judgment of the Court of Appeals summarily reversed or plenary argument ordered.

Dated: New York, New York, August 8, 1974.

Respectfully submitted,

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Appendix A, District Court Opinion Denying Writ.

UNITED STATES DISTRICT COURT
SOUTHERN OF NEW YORK

72 Civ. 3603

MEMORANDUM AND ORDER

UNITES STATES ex rel. SHELDON LEESON,

Petitioner,

—against—

DANIEL E. DAMON, Superintendent of Elmira Reformatory, Elmira, New York and THE NEW YORK STATE DIVISION OF PAROLE,

Respondent.

Brieant, J.

Petitioner, a state prisoner, seeks a writ of habeas corpus. He was convicted in Supreme Court, New York County on February 5, 1968, upon his plea of guilty of the crime of attempted grand larceny in the second degree. He was sentenced to a reformatory term, in Elmira Reformatory not to exceed five years, with possibility of earlier parole, pursuant to § 2185 of the New York Penal Law of 1909, then in effect.

On August 26, 1969, approximately one year and seven months after sentencing, petitioner was paroled. On September 2, 1972, he completed service of his reformatory sentence. This petition was filed August 23, 1972, and a hearing held October 20, 1972.

Petitioner duly moved before the state Justice who had accepted his plea of guilty, for permission to withdraw the plea. The state court held a hearing, and made findings of fact. The issue presented to the state court by

petitioner at that hearing was that he had pleaded guilty in reliance on an erroneous sentence prediction by his own, privately retained counsel, to which the court was not a party. His attorney had told him that he was subject to the maximum possible penal sentence for the crime to which he pleaded, this sentence being not less than one year and three months, and not more than two years and six months. There was no question of any promise from the court or prosecutor, because under the law the court had no power to impose a more severe penal sentence on the plea. His attorney had said to him that he would get no more than that sentence, which was the maximum the law permits.

The state court correctly held after the hearing that this sort of prediction, made solely by petitioner's retained counsel, without the participation of any person in official capacity, the District Attorney or the Court, was not a basis for withdrawing the guilty plea. A judgment to this effect was affirmed by the Appellate Division on October 14, 1969 (33 App.Div.2d 656) and leave to appeal to the New York Court of Appeals was granted and the judgment affirmed, (27 N.Y.2d 680).

The sole issue determined by the state courts was whether the erroneous sentence estimate by defense counsel rendered the plea involuntary. *U.S. ex rel. LaFay* v. *Fritz,* 455 F.2d 297 (7th Cir. 1972).

Allegedly, at the time of the plea, petitioner's then attorney overlooked the fact that petitioner was then aged 23 and could be sentenced alternatively to a reformatory term in Elmira pursuant to the aforementioned statute. This, in fact, was the sentence imposed.

There is now tendered the greater and different issue of whether petitioner knew, from his lawyer or any other source, that he was facing, alternatively, a five year reformatory sentence to Elmira, and whether he would have entered the plea if he had known. Accordingly, the constitutional question now is whether petitioner's plea was made "with full understanding of the consequences"

(*Kercheval* v. *United States*, 274 U.S. 220, 223). Guilty pleas are now valid only if both voluntary and intelligent. Otherwise, acceptance of a guilty plea violates due process. *Brady* v. *United States*, 397 U.S. 742, 747 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 766 (1970).

The parties before me urge that no evidentiary hearing need be held. Respondent urges that the issues of fact have been fully litigated in the state court and that pursuant to 28 U.S.C. § 2254(d) and *U.S. ex rel. Preston* v. *Mancusi*, 422 F.2d 940 (2d Cir. 1970) we should presume the state court's conclusions in this regard are correct. Petitioner says that the state record, and the uncontradicted affidavit of the attorney who represented petitioner at the time of the plea, require the writ be granted.

It appears that the constitutional issue as now tendered has not been determined by the state court. Accordingly, state remedies have not been exhausted.

As stated in *United States ex rel. Figueroa* v. *McMann*, 411 F.2d 915 (2d Cir. 1969) at page 916:

> "When a state prisoner presents a materially different claim and stronger evidentiary case before the federal court in a habeas corpus petition, and a state forum is available to consider the additional factors and varied claim, the federal court should properly dismiss the petition before it. United States ex rel. Boodie v. Herold, 349 F.2d 372 (2 Cir. 1965); United States ex rel. Kessler v. Fay, 232 Supp. 139, 142 (S.D.N.Y. 1964); United States ex rel. Scarnato v. Fay, 347 F.2d 424 (2 Cir. 1965). Nothing in Roberts v. LaVallee, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed. 2d 41, reversing United States ex rel. Roberts v. LaVallee, 373 F.2d 49 (2 Cir. 1967), requires a different result here."

Further, as stated in *Clark* v. *Nickeson*, 321 F.Supp. 415 (D.Conn. 1971), citing authority:

> "'[W]here the federal habeas court is unable to determine unequivocally that an issue has been consid-

> ered and ruled upon by the state courts, comity requires us to 'put the fact finding and law finding responsibility squarely on the *** [state courts] where, initially at least, it belongs.' Spencer v. Wainwright, 403 F.2d 778 (5th Cir. 1968). Williams v. Wainwright, 410 F.2d 144, 145 (5th Cir. 1969), cert. denied, 398 U.S. 943, 90 S.Ct. 1846, 26 L.Ed.2d 281 (1970)."

The issue must be "properly presented." *Daniels* v. *Slayton,* 327 F.Supp. 701 (W.D.Va. 1971). There is a vast difference between reliance on an erroneous sentence prediction in taking a plea, and the taking of a plea other than voluntarily, intelligently and with full knowledge of the consequences. Here, that latter issue was never "properly presented" in state court.

Accordingly, the petition is denied for failure to exhaust state remedies, without prejudice to renewal by application in the nature of *coram nobis,* to the state court based upon the same constitutional claims set forth in the petition herein.

So Ordered.

Dated: New York, New York
October 27, 1972

CHARLES L. BRIEANT, JR.
CHARLES L. BRIEANT, JR.
U. S. D. J.

Appendix B, Opinion, United States Court of Appeals, Second Circuit.

UNITED STATES ex rel. Sheldon LEESON, Appellant,

v.

Daniel E. DAMON, Superintendent of Elmira Reformatory, Appellee.

No. 670, Docket 73-2597.

United States Court of Appeals, Second Circuit.

Argued Jan. 22, 1974.

Decided April 1, 1974.

As Amended on Rehearing May 13, 1974.

Gretchen White Oberman, New York City, for appellant.

Arlene Silverman, Asst. Atty. Gen., (Louis J. Lefkowitz, Atty. Gen. of N. Y., Samuel A. Hirshowitz, First Asst. Atty. Gen., of counsel), for appellee.

Before HAYS, MANSFIELD and OAKES, Circuit Judges.

OAKES, Circuit Judge:

Appellant appeals from the denial of a writ of habeas corpus under 28 U.S.C. § 2254. As a state prisoner, he was convicted in Supreme Court, New York County, on September 19, 1967, upon a plea of guilty to the crime of attempted grand larceny in the second degree. His maximum punishment for attempted grand larceny, second degree, was a term of 1.3 to 2.6 years' imprisonment.

NYPL §§ 261, 1297.[1] Unbeknownst to appellant at the time the plea was entered, as a first offender who was under 30 years of age he was also subject to the indefinite five-year reformatory term at Elmira provided for in Penal Law § 2185. On November 30, 1967, before sentence was imposed, appellant wrote to the judge, Justice Mitchell D. Schweitzer, who had accepted the plea, asking to withdraw it. He stated in the letter that his attorney "forgot how young I am" and had informed him "that my maximum sentence would be 1.3-2.6 years." Appellant stated that he was not guilty of the crime and that "I only took the plea because [my attorney] promised that all my cases[2] would be thrown into the att. Grand 2 [sic] sentence," that is to say, the sentence for attempted grand larceny in the second degree. The letter was treated by Justice Schweitzer as a pro se motion to withdraw the plea and a hearing was held.

At this time in the New York criminal procedure, it should be noted, there was no obligation on the part of the

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[1] This case arose before the revised New York Penal Law in 1967 took effect. While the conviction and sentencing occurred after the new Penal Law took effect, they were governed by the old law. NYPL § 5.05, subd. 3 (1967). Thus, the statutory references herein are to the New York Penal Law of 1909. PL § 1297 set the term of imprisonment for grand larceny, second degree, at a maximum of five years. PL § 261 specified that one convicted of an attempt must be sentenced to a maximum of "not more than one-half" of the largest sentence prescribed on conviction for the offense attempted. Under PL § 2189 the court was empowered to set a minimum term of no greater than one-half of the prescribed maximum or in this case no greater than one year and three months. Under the present law appellant's maximum imprisonment would have been one year. NYPL §§ 70.15, subd. 1, 110.05, subd. 5, 155.30.

[2] Appellant had been indicted on three counts of forgery in the third degree, and three counts of grand larceny in the first degree. His guilty plea to grand larceny in the second degree was to cover all charges. In addition, appellant had been indicted in Nassau County for another crime; he subsequently went to trial on the Nassau County indictment and the case against him was dismissed.

judge accepting a plea similar to the obligation imposed upon federal judges by virtue of Fed.R.Crim.P. 11 to make sure that the person pleading guilty does so "with understanding of . . . the consequences of the plea." Rather, as the State has conceded on argument, the sole obligation for advising the person pleading guilty as to the consequences of his plea rested on his attorney. Accordingly, there is nothing in the record to show that in any way the court accepting the plea advised the appellant as to its consequences. The state court hearing on the motion to withdraw the plea of guilty, then, turned on what the appellant's attorney had told him prior to the entry of the plea; the only evidence in the hearing was that the attorney had told him that he was facing at most a one year and three months minimum and two years and six months maximum, and that he had not advised Leeson that—indeed, that he had overlooked the fact that—appellant was of an age where he could "get Elmira", *i. e.*, receive the indefinite five-year reformatory sentence to Elmira. Again, on cross-examination by the assistant district attorney, appellant stated that the only sentencing alternatives that he was told about by his attorney were that he "could get completely cut loose, I could get put on probation, I could get one month's term, or one-three to two-six."[3] He also denied his guilt and said that he pleaded guilty to a crime which he did not commit to get everything over and done with. The sentencing judge denied relief on the basis that "[t]he defendant's insistence that he was advised incorrectly by his own lawyer as to the sentence that he believed the court would impose can in no way bind the court in the absence of a showing that the court joined in such promises." The sentencing judge thus conceived this—erroneously, we feel—as a case of an unwarranted assurance by counsel, rather

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[3] The value of the federal rule, in making sure that the record contains a defendant's statement showing his knowledge of the circumstances, is self-evident, in the light of this case.

than a case of lack of knowledge of the consequences of the plea.

Appellant appealed to the Appellate Division and then secured leave to appeal to the New York Court of Appeals, the basis for his argument being, as the briefs show, that the plea should be vacated because it was made in ignorance of the direct consequences of the conviction and that it was therefore not voluntarily entered in the constitutional sense. Both state appellate courts affirmed the conviction without opinion, so that there is no question but that appellant has exhausted his state remedies. District Judge Brieant below misconstrued this issue, probably because the briefs which were submitted to the Appellate Division and the Court of Appeals were not submitted to him at the time of the filing of the petition for habeas corpus. Thus, he incorrectly held that the constitutional issue as now tendered had not been determined by the state courts, relying on United States ex rel. Figueroa v. McMann, 411 F.2d 915, 916 (2d Cir. 1969), and he denied the petition.

The substantive facts, however, were called to the attention of the state trial court, and the issue was raised there though perhaps not as precisely as it was subsequently on appeal. On review the Appellate Division has the duty of reviewing the appellate record in determining whether errors had been preserved so as to warrant reversal "upon the facts" or "in the interests of justice," *see* NYCPL § 470.15, and the question was raised in the brief there.[4] Finally, the issue was spelled out plainly on page 5 of the appellant's brief before the Court of Appeals: "It is our contention on this appeal that appellant's plea, en-

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[4] On page 10 of appellant's brief to the Appellate Division, First Department, it was stated: "appellant should have been allowed to withdraw his plea as not having been voluntarily entered in the constitutional sense. Machibroda v. United States, 368 U.S. 487, [82 S.Ct. 510, 7 L.Ed.2d 473] (1962)."

tered as it was out of ignorance of its direct consequences, cannot be considered voluntary in the constitutional sense [Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 1009]. . . ." As our cases evince, where the record shows that a state prisoner has raised an issue on appeal, then a proper exhaustion of state remedies has taken place, irrespective of whether an appellate opinion has been written indicating this fact. United States ex rel. Ross v. LaVallee, 448 F.2d 552, 554 (2d Cir. 1971); United States ex rel. Cardaio v. Casscles, 446 F.2d 632 (2d Cir. 1971); United States ex rel. Williams v. Zelker, 445 F.2d 451, 454-455 (2d Cir. 1971).

All that is required by Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 30 L.Ed.2d 438, 455 (1971), is that the state courts must have had a "fair opportunity" to consider a constitutional claim before federal habeas is available under the exhaustion doctrine. Here clearly both the Appellate Division and the Court of Appeals had such an opportunity.

Moreover, no state collateral remedy would be available in the event he were held not to have raised the question on appeal since under the New York Criminal Procedure Law, § 440.10, subd. 2(c), a motion to vacate a judgment must be denied where sufficient facts appear in the record to have permitted adequate appellate review of an issue where the issue was not raised on appeal.

On the merits, this is not the kind of case that apparently the sentencing judge thought it was, that is to say, where a guilty plea was based on an erroneous prediction about sentence given by counsel. *See, e. g.*, United States ex rel. Bullock v. Warden, Westfield State Farm for Women, 408 F.2d 1326, 1330 (2d Cir. 1969), cert. denied, 396 U.S. 1043, 90 S.Ct. 688, 24 L.Ed.2d 686 (1970). Rather it is a case where the undisputed proof before the trial judge is that the defendant entered his plea in ignorance of what the maximum *possible* sentence was, believing it to be substantially

less than that which the court was authorized to impose and which, indeed, it did impose.

It is settled law that a defendant who pleads guilty to a charge must do so "with full understanding of the consequences." Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927). *See also* McMann v. Richardson, 397 U.S. 759, 766, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). As was explained in McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969) (emphasis added; footnotes omitted):

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and *knowing,* it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses *an understanding of the law* in relation to the facts.

Upon the facts in this case, appellant's plea was not knowing and was without an understanding of the law inasmuch as he did not know the maximum possible sentence he might receive. It is thus a plea entered in ignorance of its direct consequences, and it is therefore invalid. *See* Marvel v. United States, 380 U.S. 262, 85 S.Ct. 953, 13 L.Ed.2d 960 (1965) (per curiam); Wells v. United States, 452 F.2d 1001, 1003 (5th Cir. 1971); Wade v. Wainwright, 420 F.2d 898 (5th Cir. 1969); Kotz v. United States, 353 F.2d 312, 314 (8th Cir. 1965); Matthews v. United States, 308 F.Supp.

456 (S.D.N.Y. 1969); McCullough v. United States, 231 F. Supp. 740 (N.D.Fla. 1964). *Kotz, Matthews* and *McCullough* are particularly pertinent to the case at bar for they involved instances, albeit under federal law, where the defendants could be sentenced under the Youth Corrections Act to terms longer than if sentenced as adults, and where they alleged they were not aware of this possibility prior to their plea. These courts held that if the defendants did not know of their possible sentences under the Youth Corrections Act, then the acceptance of the pleas would be a violation of the due process clause.

It is unnecessary to remand this case for a hearing to determine whether appellant did not know his maximum possible sentence, for the appellant's contentions as to his ignorance are not disputed by the State. Moreover, appellant's original counsel has submitted an affidavit which supports appellant's own version of the facts with which, indeed, as we view it, the sentencing judge did not disagree.

Before the sentencing judge the State urged that the plea should not be allowed to be withdrawn because the State would be prejudiced by reason of its dismissal of a codefendant's indictment after the plea. Whatever weight this argument might have when addressed to a court's discretion, it has none when the issue is whether a waiver of a constitutional right has been made unknowingly, which is a question of law, not a balancing of equities. *Cf.* United States v. Pisacano, 459 F.2d 259, 262 (2d Cir. 1972). *See also* ABA Standards Relating to Guilty Pleas, Approved Draft (1968) § 2.1 and commentary, pp. 57-58. It is also of no moment that the appellant is no longer confined "actually or constructively" since the writ was filed while he was still being detained on parole by the State pursuant to the state court judgment and his unconditional release thereafter did not render his case moot. Carafas v. LaVallee, 391 U.S. 234, 237-240, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968). *See also* United States ex

rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), cert. denied, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1971).

We leave to the district court on remand the task of fashioning relief appropriate under all of the facts and circumstances. Granting the writ would, of course, permit appellant to withdraw his plea of guilty and to plead not guilty, but the State would presumably be able to bring him to trial on the offense charged, even though he has already served time in the Elmira Reformatory therefor. Alternatively, this may be another case like Mosher v. Lavallee, 491 F.2d 1346 (2d Cir. 1974), where the district court might grant the option of requiring that appellant be given the sentence he thought was the maximum, 1.3-2.6 years' imprisonment. A hearing may be appropriate to make this determination.

Reversed and remanded for proceedings consistent with this opinion.

HAYS, Circuit Judge (dissenting).

I dissent.

The conduct of Leeson's counsel was not so ineffective as to raise a constitutional issue. The circumstances of Leeson's conviction and sentence are not such "as to shock the conscience of the Court and make the proceedings a farce and mockery of justice," the standard applied by this court in determining whether the assistance of counsel was constitutionally defective. United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950, 70 S. Ct. 478, 94 L.Ed. 585 (1950); United States v. Gonzalez, 321 F.2d 638, 639 (2d Cir. 1963); United States v. Miller, 254 F.2d 523, 524 (2d Cir.), cert. denied, 358 U.S. 868, 79 S.Ct. 100, 3 L.Ed.2d 100 (1958). Leeson's attorney's advice as to maximum sentence was not so "'horribly inept' as to amount to a 'breach of his legal duty faithfully to represent his client's interest' . . ."

United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909, 91 S.Ct. 1385, 28 L.Ed.2d 651 (1971), quoting United States ex rel. Masell v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967).

"[E]rroneous advice by defense counsel as to sentence does not support attack under § 2255 unless it amounts to 'ineffective assistance of counsel' . . . ." United States v. Horton, 334 F.2d 153, 155 (2d Cir. 1964). See United States ex rel. LaFay v. Fritz, 455 F.2d 297 (2d Cir.), cert. denied, 407 U.S. 923, 92 S.Ct. 2471, 32 L.Ed.2d 809 (1972); United States ex rel. Bullock v. Warden, 408 F.2d 1326 (2d Cir. 1969), cert. denied, 396 U.S. 1043, 90 S.Ct. 688, 24 L.Ed.2d 686 (1970).

The disappointment of an expectation fostered by an attorney's inadvertence in advising or failing to advise a defendant as to a legal consequence of a guilty plea does not make the plea involuntary. United States ex rel. Scott v. Mancusi, supra; United States v. Caruso, 280 F. Supp. 371 (S.D.N.Y.1967), aff'd sub nom. United States v. Mauro, 399 F.2d 158 (2d Cir. 1968) (per curiam), cert. denied, 394 U.S. 904, 89 S.Ct. 1010, 22 L.Ed.2d 215 (1969); United States v. Parrino, 212 F.2d 919 (2d Cir.), cert. denied, 348 U.S. 840, 75 S.Ct. 46, 99 L. Ed. 663 (1954). When a defendant enters a guilty plea he waives his right to trial and "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts." McMann v. Richardson, 397 U.S. 759, 774, 90 S.Ct. 1441, 1450, 25 L.Ed.2d 763 (1970).

Section 2254 relief should be denied.